A.C. Robertson, Esq.
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THE

ARGUMENT

OF

DOCTOR CROKE,

IN THE

HIGH COURT OF ADMIRALTY,

(27th *November* 1799,)

IN THE CASE OF THE

HENDRICK & MARIA,

JOHAN CHRISTEN BAAR; MASTER,

UPON THE QUESTION OF THE VALIDITY OF A SENTENCE OF CONDEMNATION, WHILST A VESSEL IS LYING IN A NEUTRAL PORT.

TAKEN IN SHORT HAND

BY T. N. MENDHAM,

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HENDRICK & MARIA,

JOHAN CHRISTEN BAAR, MASTER.

THIS was originally a British vessel, called the Walpole, which was captured by the Mercurius, a Dutch privateer, on the 2d October 1795, and carried into the port of Christiansand in Norway. She was condemned as prize in the Admiralty Court of the Batavian Republic, at the Hague, stiled the Committee for the Affairs of the Marine, upon the 24th March 1796, and was purchased at a public auction at Christiansand, upon the 9th

June following, by Mr. Hendrick Erboe, of Langeſund, in Norway, a merchant, and a ſubject of the king of Denmark. Afterwards, being furniſhed with the regular Daniſh documents, ſhe made ſeveral voyages as his property; and being now bound on a voyage from Drammen to Amſterdam, with a cargo of timber, deals, yew, firs, ſpars, and firewood, ſhe was captured, upon the 21ſt of June 1798, by his Majeſty's ſhip the Veſtal, captain White commander, and brought to Yarmouth.

Upon the 21ſt of July Mr. Heſeltine brought in the ſhip's papers and examinations in preparatory; when the uſual monition was decreed.

Upon the 25th of the ſame month, Mr. Townley gave a claim of Jens Wolff Eſq. joint conſul-general of the king of Denmark for Great Britain, for the ſhip, as the

the property of Mr. Erboe, and for the cargo, on behalf of Hans Bourg of Dram, merchant, likewiſe a ſubject of Denmark, and for the maſter's private adventure.

Upon the 3d of Auguſt, at the petition of Mr. Nathaniel Goſtling, a commiſſion was decreed for taking the claim of Lionel Self the Younger, of Lynn in Norfolk, for the ſaid ſhip, as the original Britiſh owner. But this commiſſion was not returned, and no claim was given by him.

Upon the 17th January 1799, the cauſe came on for hearing, when it was contended, that the ſhip was liable to confiſcation for breaking the blockade of Amſterdam; but, as the evidence was imperfect, the judge required further information upon that point.

Upon ſuch further proof, the cauſe came on for hearing a ſecond time, on the 10th May; when the judge pronounced

that the ſhip had not broken the blockade, admitted Mr. Erboe's claim for the ſhip, but directed farther proof to be made of his property; and reſerved the queſtion of the cargo. See Dr. Robinſon's Admiralty Reports, page 146.

The 14th June, it was heard a third time, upon the further proof of Mr. Erboe's property, which conſiſted of the affidavits of Mr. Wolff and the maſter, with the Dutch ſentence of condemnation annexed, when the judge pronounced the ſame to be inſufficient, and directed ſtill further proof of the property of the ſhip, by verifying the ſentence of condemnation, and the bill of ſale; and the cargo was reſtored.

On Tueſday 26th November 1799, the cauſe came on for the final deciſion upon this further proof; which conſiſted of, 1ſt, The affidavit of Mr. Erboe; 2d, The notarial

notarial certificate of J. G. Thaulow; and, 3d, A certificate of the college of commerce at Copenhagen. It was argued upon that day by the King's advocate and Dr. Sewell, on behalf of the captors, and by Dr. Lawrence for the claimants; on the 27th, the court heard Dr. Croke's argument, and the replies of the captors counsel.

This case reported 4th Robinson's Admiralty Reports 43 Lond. Edition 35 Phila. Edition — See also for the final decree 6th Rob. Adm. Rep. 138 (note)

Dr. Croke,

In this case, I am counsel with Dr. Lawrence, on behalf of the claimant of the ship, and I have to reply to the observations of the advocates for the captor, in objection to the validity of that claim. From what fell from the court, and indeed from the weight of the evidence before us, I apprehend it is not necessary to enter into much discussion of the two most material circumstances in the case—the condemnation at the Hague, and a *bonâ fide* sale to

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the claimant. That ſuch condemnation actually took place; that the veſſel was afterwards purchaſed at public auction at Chriſtianſand, and the money paid by Mr. Erboe to Mr. Daniel Iſaacſon, the Dutch conſul, and depoſited in the Daniſh treaſury; not, as was inſinuated, for the ſecurity of the purchaſer, as if the title was doubtful, but under a general regulation of the government of that country, to ſecure the duties which are due upon the ſales of all foreign veſſels; that it was afterwards paid over to the houſe of De Connig, for the uſe of the owner of the Dutch privateer; that the ſentence was produced at the time of purchaſe, delivered with the bill of ſale to Mr. Erboe, remitted by him to Meſſrs. Wolff and Dorville, and are now both in the regiſtry of this court, are circumſtances perfectly eſtabliſhed by the evidence of thoſe perſons who were beſt able to aſcertain them—by a full and detailed affidavit of the claimant, by the certificate

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of Mr. Thaulow, a notary public, in a reſpectable public ſituation, as ſecretary to the high court at Chriſtianſand, and what is more important upon this occaſion, the inſpector of public ſales; and likewiſe by the certificate of the royal college of commerce. Correſpondence has been called for; but what correſpondence could exiſt, where the party was upon the ſpot, and tranſacted all the buſineſs himſelf? Receipts have likewiſe been required; but the official certificates of thoſe perſons, and of thoſe offices, through whoſe hands the whole tranſaction paſſed, ſuperſede the neceſſity of ſuch private documents, and are even more authentic evidence.

But there is another fact in the caſe which I can by no means conſider as eſtabliſhed; that the veſſel was never in a Dutch port. Upon this occaſion I muſt borrow the obſervation of my learned leader, that from the words of the ſentence

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of condemnation, which ſtate her to have been *carried into Chriſtianſand, and now brought to trial*; the contrary is rather to be inferred. If ſuch is the interpretation of theſe words, what is averred upon the face of a ſolemn judgement muſt be taken to be true. There are ſome other circumſtances likewiſe, which render it probable. A long interval of time appears to have intervened between the capture and the ſale. How is this ſpace to be filled up? It is not probable ſhe ſhould have continued lying totally idle in the port of Chriſtianſand. A mere condemnation, if it had not been thought neceſſary to carry her to Holland, might have been obtained much ſooner.

There is another circumſtance likewiſe, which ſeems to point the ſame way. The veſſel has incurred an expence, which bears a large proportion to her whole value. The purchaſe money depoſited was 2,650 rix dollars;

dollars; what are ſtiled *debts to a conſiderable amount*, were 1,800 rix dollars. Theſe charges cannot be accounted for by any expences attending her lying in port all the time, ariſing from mere care and cuſtody, even taking duties into conſideration. A Britiſh ſhip, in the high ſtate of our trade and navigation, captured in the courſe of a long voyage, can ſcarcely be ſuppoſed to have been in ſuch a very dilapidated condition as to require repairs, the expence of which was nearly equal to her whole value. Without ſuppoſing an intermediate voyage to have been performed, it will be difficult to account for theſe charges,

But admitting that the veſſel was never carried into a Dutch port, three queſtions have been pointed out by the court to the attention of counſel;

1ſt, Whether

1ſt, Whether, under the circumſtances of the caſe, the pretended Britiſh owner is now entitled to be heard?

2dly, Whether, in caſe he is precluded, the captor can ſet up his title? And,

3dly, If his right can now be ſet up, whether the ſentence of condemnation is valid?

1. This veſſel was captured upon the 21ſt of June 1798, the monition was decreed upon the 21ſt of July, Mr. Erboe's claim was given upon the 25th of the ſame month, and on the 3d of Auguſt, a commiſſion iſſued, at the petition of Mr. Nat. Goſtling, to take the claim of Lionel Self, of Lynn in Norfolk, the pretended Britiſh owner; but though a year and four months have elapſed ſince the ſervice of the monition and the decree for the commiſſion,

miſſion, no return has been made to it, nor has any claim been given.

A year and a day is the time fixed by the ancient rules of this court, within which claims muſt be given. Within that time their admiſſion, if they are not otherwiſe objectionable, is a matter of right. The court may indeed relax the ſtrict rule of law, and admit them after that period; but it is an act of favour, and only granted under peculiar circumſtances. It will not be pretended that any acts have been done by the party, which amount to a claim, or which will prevent his being concluded by the lapſe of a year and a day. Merely conſtituting a proctor, and ſuing out a commiſſion, cannot be conſidered in that light. A claim muſt be upon oath, and muſt ſhew the intereſt of the party; thoſe acts may be done by any perſon who has no intereſt whatever.

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Has he any claim of merit to induce the court to relax the time? That favour is only granted, I apprehend, when the party has been prevented from making his claim within the regular time by unavoidable neceſſity; ſuch as reſidence abroad in a diſtant country. But are there any ſuch circumſtances in this caſe? The claimant is a Britiſh ſubject, reſident in a neighbouring county, almoſt within ſight of St. Paul's; and, indeed, his appearance by his proxy completely excludes him from all plea of inability to give a claim, or of not being cognizant of the proceedings going forwards in this court. A party who has thus trifled with the proceſs of the court, and has been guilty of ſuch negligence and laches, can have no poſſible claim to particular indulgence.

2. If the alleged original proprietor cannot be heard, much leſs is it competent to the captor to ſet up his title. It is a rule

rule in all courts, not to allow one party to ſtand in the ſhoes of another, without being properly authorized or conſtituted for that purpoſe. The rule will hold ſtill ſtronger when that party himſelf is, in ſome meaſure, before the court. This maxim has been completely eſtabliſhed in this court, in the caſe of violation of territory. A capture made within the limits of a neutral country is illegal and void, But, if the ſovereign of the nation whoſe territories are ſaid to be infringed upon, and who is more particularly injured, does not chuſe to intervene, in ſupport of his own intereſts, the owner of the veſſel or cargo is not allowed to be heard upon that objection. The reaſon, I ſuppoſe, upon which the rule is founded, is this, that where a party has ſo abandoned a pretended intereſt, it is preſumed that no ſuch intereſt really exiſted. For men are not very apt to give up their claims where they think them maintainable,

If the captor could be allowed to ſet up this claim, he would ſtand in a very ſingular ſituation. He tells the neutral claimant, *you* have no right to this veſſel, it belongs to the Britiſh proprietor; then he attacks the Britiſh proprietor, and tells him that he has no right to it neither, becauſe he is precluded from claiming. And ſo being in *bona fide* poſſeſſion he would keep it for himſelf. He kicks down the title of the neutral claimant, by another title, which proves to be a mere nullity. If the captors only claim ſalvage, how can they be entitled to it when the proprietor does not recover his property?

3. But if the title of the original owner can be ſet up, it becomes neceſſary to decide the third queſtion pointed out by the court—Whether a ſentence of condemnation, pronounced in a court of admiralty of a belligerent power, whilſt a veſſel

veſſel is lying in a neutral port, is valid, ſo as to enable the captor legally to transfer the prize, by a ſale for a valuable conſideration, to a neutral purchaſer, and entirely to diveſt the right of the original owner? And I ſhall contend that ſuch ſentence *is valid*; and upon three grounds: 1ſt, From the principles of the law of nations, and the reaſon of the thing: 2d, From the authority of eminent juriſts: And, 3d, From the practice of nations.

Upon the firſt of theſe heads it will be neceſſary to conſider a little upon what footing a ſentence of condemnation ſtands, as a means of converting the property, and whether thoſe grounds are equally applicable, if a veſſel is lying in a neutral port.

1. When it is once agreed that property may be acquired by war, a queſtion

immediately ariſes, *at what time, or by what circumſtances*, it completely veſts in the captor. I apprehend that by the univerſal, or rather the natural, law of nations, there are only two principles which can ſerve to decide this queſtion, of which one is hardly maintainable. All other rules are merely poſitive or conventional.

The firſt is this, that the property does not veſt till a treaty of peace is concluded. This is the decided opinion of Pufendorf, and has been taken up by ſome modern writers upon thoſe ſubjects. But it depends upon falſe principles, and has been employed for improper purpoſes. It is grounded upon a ſuppoſition, that no man can be deprived of his property but by his own conſent. It has been brought forward to eſtabliſh that unnatural ſyſtem, which has been ſo juſtly reprobated by this court, of a military war, and a commercial peace; a ſyſtem which

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tends to deprive belligerent powers of their juſt rights, and, perhaps, is calculated ultimately to undermine the naval and commercial ſuperiority of Great Britain.

The other principle, I apprehend, is what alone can be ſupported, that the property veſts *immediately* upon the capture. It was firſt brought to notice perhaps by the rule of the civil law, *res captæ ſtatim capientium fiunt*; and though the word *ſtatim* was underſtood to extend to a deduction *intra præſidia*, that extenſion was admitted for reaſons peculiar to that law, and which do not hold good when it is applied as a general rule. For, ſince a man loſt all his rights as a citizen, by captivity, which amounted to a civil death, it was the humane policy of that law, to ſtave off, as long as poſſible, the legal capture, which was attended with ſuch baleful effects. This principle is

maintained by Voet, and Burlamaqui, and many other eminent writers: The former ſays, that, "*it is moſt true that the property in a prize is acquired to the enemy by occupation only. Since by natural reaſon the property in things commences by poſſeſſion, and as animals taken in the air, the ſea, or upon the land, belong immediately to the perſon who catches them, ſo likewiſe what is ſeized in war.*" And, indeed, there is the concurrence of every circumſtance which can be conſidered as neceſſary to conſtitute the right of property. A juſt title, the laws of war; a poſſeſſion gained under that title, and the intention of availing oneſelf of it.

But however true and juſt in itſelf, this rule, in practice, was found extremely inconvenient. If a veſſel, for inſtance, was taken by the enemy, and immediately retaken, it would be hard that the right of the original owner ſhould be totally extinguiſhed

guiſhed by ſuch a ſhort poſſeſſion. Many other caſes might be ſuggeſted where the *ſummam jus* would ſeem to approach nearly to the confines of the *ſumma injuria*.

It was found expedient, therefore, to relax the ſtrict rule, ſomewhat to contract the rights of captors, and to enlarge thoſe of the original proprietor. One of theſe modifications was a limitation in point of time, and the rule of twenty-four hours was introduced. It had one merit, that of preciſion; but it was moſt completely arbitrary, and is now univerſally abandoned.

Another relaxation was, that things taken ſhould not become the property of the captor till they were conveyed into a place of ſafety. That this rule was merely of the conventional or cuſtomary law of nations, I ſhall content myſelf with the teſtimony of Grotius, the father of that

law, who begins the paſſage in which he explains that doctrine, by the words *placuit gentibus*.

At laſt, the neceſſity of a ſentence of condemnation was admitted; and this rule ſeems greatly ſuperior, in anſwering every purpoſe which was propoſed, to thoſe which preceded it. Like them it formed a very convenient intermediate point of time, between the mere capture, and a treaty of peace, to give the original owner a fair chance to recover his property, and yet near enough to allow the captor to avail himſelf of his good fortune, in a reaſonable time, to diſpoſe of his prize to neutrals, and to qualify it with a tranſferrable capacity of being thrown into the general circulation of property. In preciſion it exceeds that of the rule of twenty-four hours. It is more eaſily aſcertained, and it is of all others the moſt capable of proof. It is, beſides, a deciſion

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of a ſolemn tribunal upon all the facts neceſſary to conſtitute a legal capture; it eſtabliſhes the ſtate of war, the national character of the parties, the time, the mode, and every circumſtance relating to the capture. And it is the formal act of a court of juſtice, which other nations are bound to reſpect.

But here let me aſk, whether in all theſe reſpects, which ſeem to have been the reaſons why the rule was introduced at all, can any real diſtinction be taken, whether the veſſel is brought home to the enemy's country, or is lying in a neutral port? In either caſe, has the ſentence leſs preciſion, is it leſs capable of proof, leſs a deciſion upon all the points neceſſary to be proved, leſs a ſolemn ſentence of a regular tribunal?

In fact, that diſtinction is more captious than ſolid; more an objection of form

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than of ſubſtance. All courts hold cognizance of caſes where the ſubject matter is ſituated out of their local juriſdiction. Our own municipal courts hold pleas continually, where the cauſe of action ariſes in foreign parts. How many cauſes are tried every year at Guildhall, upon contracts and torts, which have been made or happened beyond the ſeas? We have nothing indeed exactly ſimilar to the actions *in rem*, of the civil law; but in thoſe proceedings which approximate moſt to them, ſuch as actions of detinue, I apprehend, the ſame practice, were they more in uſe, might be adopted. A fiction, indeed, is made uſe of to ſatisfy the forms of law; an event is ſaid to happen at Liſbon, in the kingdom of Portugal; videlicet, at Iſlington, in the county of Middleſex. But the courts, eſpecially of this kingdom, would never admit ſuch a barefaced fiction, but for the purpoſe of promoting ſubſtantial juſtice; nor, if they thought

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the mere local ſituation at all material to the real juſtice of the caſe. For *in fictione juris conſiſtit æquitas.* If municipal courts extend their juriſdiction out of their mere local confines, how much more is it conſonant to the nature of a court of admiralty, whoſe narroweſt limits are thoſe of the boundleſs ocean?

It is univerſally admitted, that it is the duty of all nations to reſpect, and to allow the validity of a ſentence of a competent court of juſtice of a foreign country. It is equally their duty, therefore, to reſpect thoſe laws by which the court of juſtice is conſtituted; for it is ſuppoſed to be a *competent* court; and how is that competence to be determined, but by the laws of the country which eſtabliſhes them? We are bound therefore to reſpect thoſe conſtituting laws, unleſs they have exceeded their powers; and to acquieſce in their regulations, as to the mode of proceeding,

ceeding, and the extent of their juriſdiction. They may enlarge or contract ſuch juriſdiction. They may appoint one court for captures in the Mediterranean, another for thoſe in the Baltic, or the Atlantic ocean; and they may equally allow them to decide upon captures, whether they are lying in a port of the country, or in a neutral port. If the juriſdiction of a court is thus by law eſtabliſhed, it is of the amity and duty of other nations to allow it to be legally eſtabliſhed, to preſume *primâ facie*, that their proceedings are regular, and that they have not exceeded the bounds of their proper juriſdiction. Such muſt be the preſumption till the contrary appears; which can only happen, where there are not ſufficient grounds to found a juriſdiction, or where the exerciſe of it would occaſion a defect of juſtice.

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In this inſtance there are certainly ſufficient grounds to found a juriſdiction. The prize is in the poſſeſſion of a ſubject of the country, and that poſſeſſion muſt be allowed to be a poſſeſſion of the country of which he is a ſubject. If this poſſeſſion was accompanied with the right of property, the thing in queſtion would be a part of the national property, of the domains of the country. Mere local ſituation in that reſpect is immaterial. A diſtant colony, an iſland in the South Seas, is as much a part of the national domains, as if they were ſituated in the centre of a province in the mother country. To determine that point, it muſt be aſked, not where the thing itſelf is ſtationed, but where the benefits, the profits, the emoluments, centre. A ſhip, for inſtance, may never viſit the country of its owner during its whole exiſtence; it may be conſtantly employed, from the firſt building, till it is broken up, in foreign voyages. It may be

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ſometimes upon the ſea, ſometimes taking in or delivering a cargo in this country, ſometimes in that; wintering in one port, repairing in another; but it will not be argued that this is not a veſſel of the country of which the owner is a ſubject, and where he is domicilled. Becauſe it is for him, and ultimately through him, for the country of which he is a ſubject, that ſhe earns her freight, and other profits; as long as ſhe continues his property, and when he diſpoſes of her, the price, her repreſentative, is added to the national ſtock. If then ſuch a poſſeſſion by a ſubject, when coupled with the right of property, would be ſufficient to render a veſſel a veſſel of that country, to unite it to the national domains, the ſame poſſeſſion, conſidered independently of the right of property, muſt be a ſufficient poſſeſſion to found a competent juriſdiction.

It is ſufficient, likewiſe, in another reſpect, that ſuch a court would have the means of inforcing its juriſdiction. Its proceſs can operate upon the perſon of the ſubject, who is ſuppoſed to be domicilled within the country where it is ſtationed; it can operate upon his property there ſituated, and by the aſſiſtance of requiſitions, which are univerſally known in all the countries of Europe, it can affect even the very thing in queſtion.

But it may be ſaid, that the poſſeſſion itſelf is not ſuch a poſſeſſion as is ſufficient to found a juriſdiction.—That it is not perfect and complete, till a prize is carried into a port of the captor's country. That the prey is not ſecured, nor the hope of the owner extinct. But I apprehend, that the contrary is the fact; and that a veſſel is much ſecurer in a neutral port, than in her own country. In a port of a belligerent power, veſſels are frequently cut out,

out, the port itſelf may be taken, or the country where it is ſituated. A neutral port is protected by the rights of neutrality, and exempted from all hoſtile attempts. If it be ſaid, that a veſſel is uſeleſs whilſt it continues in a neutral port, and that it muſt ſail out, and become liable to recapture, before the captor can turn it to his profit; the ſame obſervation will hold good if ſhe is brought into a port of his own country. The extinction of the hope of the original owner muſt always be proportionable to the degree of ſecurity to the captor, and conſequently thoſe hopes muſt be leſs in this caſe than the other.

Neither would the exerciſe of ſuch juriſdiction occaſion any defect of juſtice. This caſe differs totally from that of conſular courts. With reſpect to them, it was ſaid that the owner would never know where to look after his property; that a

condemnation might take place, even in defect of a claim, in ſome diſtant part of the world, without his knowing any thing of the matter. But here, it is ſuppoſed that the tribunal is in the dominions of the country itſelf. Claimants would know where to apply, and to have every legal aſſiſtance, and advice. The evidence, in the firſt inſtance, by the general law of Europe, muſt be ſolely that which is found on board the veſſel captured—the original documents, and the depoſitions of the maſter, and part of the crew—thoſe examinations may be as well taken in a neutral port as in thoſe of the country; and may be remitted with the papers, to the court, with as much facility as from an out-port of the country itſelf. No other evidence is admiſſible in the firſt inſtance; and if the claimant was not ſatisfied with the firſt deciſion, the remedy by appeal would be equally open to him.

I ſhall proceed, in the ſecond place, to ſupport the legality of this ſentence by the opinions of ſome diſtinguiſhed writers upon the law of nations. Whatever may be the practice now, the neceſſity of a ſentence of condemnation has been but very lately introduced amongſt the other countries of Europe; and it was till within theſe few years, I believe, almoſt peculiar to Great Britain. It is not to be expected, therefore, that the queſtion ſhould have been much diſcuſſed by foreign juriſts. But they had occaſion to conſider the point which now occurs in ſome other reſpects. For, when they allowed a deduction into a place of ſecurity alone to be ſufficient to convert the property, it became neceſſary to determine, whether a deduction into a neutral port would have that effect. If, then, I can produce the opinions of any of thoſe learned men, that ſuch a deduction was alone ſufficient to have worked a converſion, it is clear that

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the ſame reaſons will hold good to remove any diſtinction between one port and the other, as applied to a caſe of condemnation; and that if they thought a mere deduction into a neutral port ſufficient, *à fortiori*, would they have thought it ſo when a ſentence of condemnation was ſuperadded.

The firſt opinion which I ſhall quote, is that of Bynkerſhoeck; who is moſt decided, that a deduction into a neutral port is ſufficient. He relates a caſe of two Hamburgh veſſels which had been taken by the French, having on board ſome property of merchants in Amſterdam. They retained them in their poſſeſſion fourteen days, and carried them into the port of Hull. They were afterwards retaken by the Zealanders, and condemned to the recaptor. The Amſterdam merchants appealed to the States General, who reverſed the ſentence of the courts of Zeeland; and decreed the goods

to be reſtored to the original owners, becauſe they had not been taken into an hoſtile port, condemned, and ſold there. Notwithſtanding the natural prejudice in favour of the proceedings of his own country, and the reſpect due to their decrees, he declares, without the ſmalleſt heſitation, that it was a deciſion contrary to law: *Zeelandi jure, ordines generales auctoritate mihi videntur viciſſe.* Such is the opinion of Bynkerſhoeck; and with reſpect to the caſe itſelf, it was an early deciſion in 1675, when the principles of the law of nations might not be ſo well underſtood, and ſeems to have ſtood ſingle.

Vattel is equally decided.—" The property in moveable things is acquired by the enemy from the moment they are in his power; and if he ſell them to a neutral nation, the original proprietor has no right to claim them. But it is neceſſary that they ſhould be actually in the enemy's power,

power, and conducted into a place of ſafety." The words, "place of ſecurity," are applicable to one caſe as well as the other; and ſince this queſtion had been ſtarted before Vattel's time, he muſt have been aware that ſuch a diſtinction had been attempted; and as he has not made any ſuch diſtinction himſelf, we have no right to make it for him. The ſame may be ſaid of the *Conſolato*, when it ſpeaks of a *loco ſicuro*. But he has explained himſelf ſtill farther in another paſſage. "When the capture is complete, the prey abſolutely in the power of the enemy, no inquiry is made where the goods come from; they are *his*, he diſpoſes of them in a neutral country. A captain of a privateer conducts his prize into the firſt neutral port, and is at liberty to ſell it there."

I ſhall next produce the ſentiments of a celebrated writer, who is not diſcuſſing abſtract ſpeculative points, but treating

of a ſubject of daily, practical utility, that of inſurances; I mean Emerigon. In his firſt volume, page 521, he quotes the words of Vattel, which I have juſt ſtated, with approbation, and ſays, that in defect of treaties, or any other particular law, that is the general rule which is to be obſerved.

To theſe authorities I might add many more; but as I think theſe fully ſufficient, I am unwilling unneceſſarily to take up the time of the court, but ſhall proceed to conſider the practice of various nations upon this head.

It is frequently difficult to determine any queſtion of the general law of nations from what occurs in treaties. Becauſe, ſince any of the articles agreed upon may be either in affirmance of the law of nations, or in derogation of it, it may not clearly appear, in any given caſe, how the particular article is to be underſtood in

that

that reſpect. I ſhall therefore confine myſelf to ſuch authorities as ſhew the practice of particular nations, independent of all expreſs convention, from their ordinances chiefly, and edicts.

I ſhall begin with France; not modern France, trampling under foot the long eſtabliſhed ſyſtem which had immemorially governed the conduct of nations, and inſolently impoſing her municipal regulations as a law to the whole world; but ancient France, high and honourable amongſt the countries of Europe; whoſe marine ordinances form, perhaps, the beſt naval code that has ever been compoſed; and which has ſerved as a baſis to a very conſiderable part of the cuſtomary law of nations now generally obſerved. In the Code des Priſes, part the ſecond, page 761, is an ordinance of the 8th November 1779. It is long, conſiſting of no leſs than twenty-eight articles, and relates ſolely to

this very ſubject. It is entitled, "Regulations of the King of France concerning prizes which ſhall be carried into foreign ports; and the forms which are to be obſerved by his majeſty's conſuls there eſtabliſhed." They are to draw up a proces verbal, and to take the examinations; which are to be remitted, with the documents found on board, to the ſecretary general of the marine. They are then to wait till a ſentence has been pronounced; which they are to carry into execution, by reſtoring the prize, by ſelling it at publick auction, or otherwiſe, according to the circumſtances, and in the mode there preſcribed.

If *force became neceſſary*, as where a capture had been made without a letter of marque, in which caſe the conſul was directed by the fourth article, to take poſſeſſion of the prize, and to detain it in the port in ſecure cuſtody; if there was occaſion,

ſion, he was inſtructed to *apply to the government of the country* for aſſiſtance, *demanderont main-forte in cas de beſoin.* It cannot be ſaid that theſe regulations were impracticable, either *de facto* or *de jure*; the conſul had the means of carrying them into effect. If the parties were conſenting, no difficulty could ariſe; if reſiſtance was made, if there was any refuſal to ſubmit to examination, or to do any other act required, the ſtrong arm of the country was called in. The mutual acceptance and execution of requiſitions are a part of the uſual amity between all the nations of Europe.

As theſe regulations, therefore, were not nugatory, ſince there were ſufficient powers to enforce them; neither were they illegal in infringing the rights of territory of a neutral country.—No independent tribunal is erected. The acts directed to be prepared by the conſul are not

not *judicial*; they are merely thoſe which might be executed by a notary publick, by an agent, or common merchant, and proper ſubmiſſion to his authority is not to be compelled by his aſſuming any means of compulſion, but through the medium of the government of the country itſelf. Proceedings perfectly conſiſtent with every Duty to neutral nations.

But the practice itſelf was long anterior to this ordinance. I ſhall quote two caſes, one of which happened nearly a century, and the other at a conſiderable diſtance of time before that period.

The firſt is what I have already alluded to from Bynkerſhoeck, was in the year 1675, where, though the veſſel was not carried into a French port, both ſhip and cargo were condemned at Dunkirk, whilſt they were lying at Hull, and afterwards ſold.

The

The other is the caſe of *La Marie Angelique*, related by Emerigon, page 520. This was a French veſſel, captured by the Engliſh, and carried to Malta. The ſhip and cargo were purchaſed of the captors by the Sieurs Abella, Malteſe merchants, and ſent to Marſeilles. The original owners, and the inſurers, claimed their property, and got poſſeſſion by a proviſional decree of the admiralty. A ſentence was pronounced in June 1758, by which the claimants were confirmed in the poſſeſſion of the ſhip and cargo; but, upon an appeal, by an arret in the year following, the former ſentence was reverſed, and the ſeizure by the claimants declared void.

Having ſhewn that ſuch was the indiſputable practice of France, I ſhall proceed to another nation equally reſpectable, I mean Ruſſia, a power who has always been remarkably obſervant of the law of nations.

nations. In the eighth article of the Empreſs's regulations for her privateers, of the 31ſt December 1787, in Martens's Collection, vol. iv. page 507, it is ordered, That no part of the cargo of a captured veſſel ſhall be unladen, or ſold, but that it ſhall be carried directly to Leghorn, or Venice, to perform quarantine. The captain of the privateers ſhall be obliged to appear there before the Ruſſian miniſter, and, after delivering up to him the papers and documents found on board the ſhip taken, to wait till the ſhip and cargo be adjudged good prize, or lawful capture. Then follow other inſtructions as to the mode of procedure, which ſufficiently prove the uſages of that country.

So too in an edict of the republic of Venice, a city formerly of great conſequence, but ſtill reſpectable amongſt the naval and commercial countries of Europe. It iſſued, in September, in the year

year 1779, and is to be found in the ſame volume of Martens, page 254. The eighteenth article has theſe words, "The prizes, taken by any belligerent veſſel, and conducted into our ports, ſhall be received there, obſerving, nevertheleſs, the natural regulations of the government, or internal police; the cargo may be *aired*, warehouſed, ſold, managed, adminiſtered, acquired, by any perſon whatſoever, in all our dominions, ſuppoſing, always, that a peremptory ſentence and declaration of good prize ſhall have firſt been pronounced by a competent tribunal." Here is an expreſs acknowledgement of this right in all belligerent powers.

I come now to the authority of Great Britain herſelf.

In the famous caſe of Goſs and Withers, when we have the joint opinions both

both of Lord Mansfield and Sir George Lee, after conſulting upon the point, it was ſaid by them, that it was held in this court of admiralty, "that the property was not changed till a ſentence of *condemnation*." Not a word of any *deduction into the enemies ports* being neceſſary.

But I apprehend that the practice of this court is too notorious to require the quotation of particular caſes. It has always been uſual to try and condemn veſſels that have been lying in neutral ports. The practice has never yet been pronounced to be illegal, by any ſentence of this court, and it has been acquieſced in by foreign nations, without complaint or remonſtrance, I have a right, therefore, to aſſume the fact at leaſt, and to enumerate Great Britain in the liſt of thoſe nations amongſt whom ſuch has been the uſage.

But

But it is ſaid, that this has been the caſe only where veſſels were lying in the ports of Leghorn or Liſbon, that no other inſtances can be produced, and that the ports of Tuſcany and Portugal are diſtinguiſhed from other neutral ports, by expreſs treaties with thoſe countries, which are ſuppoſed to produce a ſort of communication of territory.

In what this communication of territory conſiſts, I own I am at a loſs to diſcover.

I have carefully looked over thoſe treaties, and I proteſt I can find nothing which can be interpreted to amount to any ſuch effect.

It is not argued that a mere alliance, either offenſive or defenſive, or both, to make common cauſe in war or in peace; or the general articles of friendſhip and amity

amity, of the mutual interchange of privileges, or even in admitting each others ſubjects upon an equal footing with the moſt favoured nation, or even their own ſubjects—is ſufficient for this purpoſe, becauſe ſuch alliances ſubſiſt in the treaties of Great Britain with many other countries, and this communication of territory is ſaid to be peculiar to the relations between Great Britain and Liſbon and Leghorn. I apprehend, therefore, that there are only two modes by which ſuch a communication of territory can be effected—By an actual ceſſion of territory, *jure dominii*, or by a grant of territorial rights, that is, of the exerciſe of thoſe rights within the dominions of the country, which excluſively belong to the government.—It is not pretended that there is any grant of actual territory, either by land or by water. I find no mention of an inch of *terra firma*, not a ſhed, or a quay, not an harbour, a river, or a creek, are ceded to us.—The

only territorial right applicable to the preſent queſtion, which could be granted to us, are thoſe of maritime juriſdiction; which muſt either be a permiſſion to erect courts there, or to allow the courts of admiralty in this country to extend their juriſdiction thither; by permitting this court to exerciſe its authority there, to execute its proceſs, and to enforce its decrees, by its own officers, independently of the government of that country. Nothing ſhort of this can amount to a communication of territory. For if this court and its officers have no power of compulſion there, but where force is neceſſary are obliged to apply to the government of that country for their authority, it is neither more nor leſs than a caſe of *requiſition*; a part of the publick law of Europe, by which one country, from motives of general amity, upon a regular application, aſſiſts another in the adminiſtration of juſtice. And the neceſſity of applying to the

government of the country itſelf, totally excludes all idea of having communicated the ſmalleſt particle of the territorial rights of juriſdiction.

Theſe principles are undeniable; in what manner do they apply to this caſe? What are the rights which have been ceded to this country by Portugal, or Tuſcany? Certainly no power of erecting courts of admiralty in thoſe countries is alleged. As little can it be ſaid that this court can execute its proceſs, or enforce its decrees by any authority of its own in thoſe countries. All that is contended for is ſimply this—That the court of admiralty is allowed to have commiſſioners at Liſbon and Leghorn for the mere purpoſe of taking the depoſitions of the maſter and ſailors on board veſſels captured and brought into thoſe ports by Britiſh veſſels; this is the whole of their function. If the parties voluntarily choſe

to be examined, they examine them; if they refuſe to be examined, the commiſſioners have no power of compulſion—Whilſt the examination is voluntary, they do nothing more than what might be equally performed by a common notary public, who might draw up a proces verbal upon the oath of the parties of all the facts relating to the capture. The moment parties are refractory, their office is at an end in both caſes; neither can uſe force; and though commiſſioners by an application to the government may compel an examination, the neceſſity of that application reduces their powers to a mere requiſition, and takes this out of the caſe of a communication of territory, to conſtitute which it would be neceſſary that they ſhould have ſome intrinſic ſubſtantive authority.

Why then, it may be ſaid, ſhould our government eſtabliſh commiſſioners in

thoſe ports, if their office might be as well executed by any notary? Or why ſhould this court confine its condemnation of veſſels lying in neutral ports to thoſe ports only where it has commiſſioners ſo eſtabliſhed? Theſe diſtinctions ariſe from reaſons peculiar to our own municipal regulations. This court will not allow depoſitions to be read in evidence which are taken by any other perſons than its own commiſſioners, except in caſes of abſolute neceſſity. It is a mere arbitrary rule of theſe courts, not a part of the general law of Europe. In the courts of other countries, the proces *verbeaux* of notaries, or of conſuls, are admitted; but this ſtrickneſs of our courts cannot alter the nature of their office; by thoſe rules, ſuch examinations only can be admitted, but they are ſtill voluntary depoſitions, taken like all other examinations before a notary, which other countries will admit as evidence, though we do not. The appointment of

commiſſioners does not diſtinguiſh the caſe of Liſbon and Leghorn from other countries in alliance, as to the right of condemning ſhips in neutral ports; but the difference is merely becauſe by the rules of this court no examinations can be admitted but ſuch as are taken by commiſſioners, and thoſe are the only ports where commiſſioners are eſtabliſhed. The ſole diſtinction, is a diſtinction of fact not of law. This court has not condemned veſſels lying in other neutral ports, becauſe no depoſitions could be taken by the rules of the court. It has made a practice of condemning veſſels in thoſe ports where commiſſioners were eſtabliſhed, becauſe there, regular depoſitions could be taken. But the eſtabliſhment of thoſe commiſſioners, whoſe acts are merely notarial, and cannot be conſidered in any point of view as producing a communication of territory, cannot affect the general queſtion of the right of condemnation where a veſſel

lies

lies in a neutral port, or form any real diſtinction as to any peculiar rights annexed to thoſe ports more than to any other neutral ports. Where commiſſioners are fixed we can proceed to condemnation according to the rules of the court; where there are no commiſſioners we cannot. This is the ſhort of the buſineſs; and we admit the right of condemning veſſels in neutral ports, by acting upon it wherever the forms of the court will admit.

But if independently of a communication of territory, the admiralty of Great Britain can legally condemn veſſels, lying in neutral ports, where it has the means, by the permiſſion of that neutral country, of taking depoſitions, and proceeding in the manner which its own peculiar conſtitution demands, that law muſt be reciprocal, and apply equally to other countries. If by the rules of a Dutch court of admiralty, the proces verbal of a notary, or of

a conſul,

a conſul, or other officer are admitted as evidence in a prize cauſe, for the court to proceed upon to condemnation, ſuch depoſitions are as valid and regular in that court as thoſe taken by commiſſioners could be in ours. The diſtinction between ports where there are commiſſioners, and where there are not, does not hold good in their caſe as it does with us. Any port where there are officers, no matter whether of their own country or not, to take depoſitions according to the rules of their court, is as competent as Liſbon or Leghorn, whoſe only recommendation it is to this country that examinations may be taken according to rule. And if whenever we can take ſuch depoſitions according to *our* rules, the condemnation is lawful, it muſt be equally ſo in their courts, whenever they have the means of proceeding regularly according to *their* rules. That all the proceedings in this caſe were regular, that the depoſi-

tions were taken by the proper perſons, according to the practice of the court at the Hague, is a preſumption *juris et de jure*, which cannot be averred againſt, becauſe it appears upon the face of the ſentence of condemnation. That the government of Denmark permitted every part of theſe proceedings which were had in that country is clear, becauſe the tranſactions ſubſequent paſſed through the hands of its own officers.

Beſides, no treaty between any two nations can bind the rights of a third nation more than the municipal laws of one country can bind another. No maxim can be better eſtabliſhed by univerſal teſtimony and principle. If a condemnation therefore here, whilſt a veſſel is lying at Liſbon, would be void, *without a particular treaty*, *no treaty* between this country and Portugal can render it *valid*, ſo as to conclude other countries, who were no party

to

to them unleſs indeed they ſhould amount to an actual communication of territory, which is not the caſe here, and a treaty would then operate not by altering the general law, or affecting the general rights of other nations, but by changing the character of the country itſelf, by converting it from a neutral to a belligerent power, for that purpoſe at leaſt, and thus bringing it under the laws which relate to belligerent powers in general.

I have now gone through, as ſhortly as poſſible, the heads I propoſed; and I have endeavoured to ſhew, and I hope and truſt to the ſatisfaction of the court, that principles, authority, and the practice of various nations, unite in ſupporting the validity of this ſentence of condemnation. The examples I have adduced are not of to-day or yeſterday; not a ſolitary inſtance, which took place to anſwer preſent exigencies, for peculiar circumſtances, or

under a new and irregular ſyſtem; but the eſtabliſhed, ancient, and continual mode of proceeding of ſome of the moſt regular and honourable nations in Europe, in which number this country is likewiſe included. If thoſe examples are not very numerous, it muſt be conſidered that we have very few opportunities of knowing the practice of foreign courts of admiralty, or of producing their domeſtic regulations. Their reports are not publiſhed, there are few treatiſes upon thoſe ſubjects, and of theſe ſtill fewer are imported into this kingdom. If I had in my power the means of a more extenſive enquiry, I am perfectly ſatisfied in my own mind, from what I have hitherto diſcovered, that this practice has been little leſs than univerſal.

To arguments drawn from inconvenience, I ſhall make no reply. They are highly improper to be urged in a court,

which is to decide by the rules of law, not by the ſuggeſtions of policy. I am far from being ſatisfied that any great inconvenience would ariſe to this country from admitting ſuch condemnations, ſince neutral ports would ſtill be open to the enemies cruizers, and to the reception of their prizes; but were they ſtill greater than I apprehend them to be, ſuch conſiderations may be juſt grounds for remonſtrance and negotiation, but can never be ſuffered to weigh a feather in the ſcales of juſtice.

FINIS.

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